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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 67-2

October Term, 1970

* * *

JOE H. TONAHILL,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

Petitioner, Joe H. Tonahill, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit whereby that court overruled and set aside a district court order excluding from evidence certain information obtained by Treasury Agents in the course of an income tax investigation.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported. It appears in the Appendix hereto (pp. A-9-14), as does the order overruling motion for rehearing (p. A-15). A prior order of that court denying Appellee's Motion to Dismiss for Want of Jurisdiction is also included in the Appendix hereto (p. A-8). The opinion of the District

Court for the Eastern District of Texas, Beaumont Division, reported, 308 F.Supp. 97 (E.D.Tex. 1970), similarly appears in the Appendix hereto (pp. A-1-7).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 13, 1970. A timely filed petition for rehearing was denied on August 13, 1970, and this petition for certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented by this case are as follows:

1. Are *Miranda*-type warnings required in criminal investigations for possible income tax fraud?

2. On the question of waiver of constitutional rights is the burden on the defendant to prove by clear and convincing evidence that evidence was obtained from him by fraud, trickery or deceit or is the burden on the government to prove that the evidence was voluntarily given by the defendant?

3. Does the refusal of Treasury Agents to answer direct inquiries as to the nature of their investigation coupled with evasive responses constitute fraud, trickery or deceit making evidence obtained thereby subject to motion to suppress in an income tax fraud case?

4. Does a court of appeals have the authority to reverse a district court's findings of fact and to render a contrary judgment when the appellant has not tried the facts in issue and has conceded that the facts as found by the trial court are true?

5. Is the specification in 18 U.S.C. §3731 that cer-

tification be made by "the United States attorney" essential to the exercise of jurisdiction by a court of appeals?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing that place to be searched, and the person or things to be seized."

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

CONSTITUTION OF THE UNITED STATES, AMENDMENT VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defense."

18 U.S.C. §3731:

> "An appeal may be taken by or on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances:
>
> ". . .
>
> "From an order granting . . . a motion to suppress evidence, . . . if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for the purpose of delay

and that the evidence is a substantial proof of the charge pending against the defendant."

STATEMENT OF THE CASE

Petitioner is under indictment for violation of Internal Revenue Code, 26 U.S.C. §7201 (Cir.Ct.Appendix, pp. 8-10). In response to his motion grounded on the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States (Cir.Ct.Appendix, pp. 11-17), the United States District Court entered an order suppressing evidence found to have been obtained by "affirmative fraud, trickery and deceit" on the part of the Revenue Agents. Because of the conclusion on that point, the district court found it unnecessary to "reach the question of whether *Miranda* applies to the instant case" (Appendix, pp. A-2-5).

In reliance upon 18 U.S.C. §3731, an Assistant Attorney General gave notice of appeal on behalf of the United States and signed a certificate relative to matters specified in the statute. The United States attorney for the district did not participate in the appeal in any way. As defendant-appellee, Petitioner filed a motion to dismiss for want of jurisdiction because of failure to comply with mandatory provisions of the statute. The motion was denied by the Court of Appeals for the Fifth Circuit (Appendix, p. A-8).

The government's appeal was based upon only two issues which were stated to be (Brief for Appellant, p. 1):

> "1. Whether Treasury agents have a duty to warn a taxpayer that their investigation into his civil tax liability has taken on criminal aspects.
>
> "2. Whether, under the facts as found by the District Court in this case, there was such deception

on the part of the Treasury agents that the evidence furnished by the defendant was properly suppressed."

The position of the government was that *Miranda*-type warnings are not required in criminal investigations for possible income tax evasion and that "admissions [made without any warning whatsoever] are not rendered inadmissible merely because they are procured by deceit, trickery or fraud" (Brief for Appellant, pp. 6-7). Both of the investigating agents had admitted that no warnings were given (Tr. B. 68, 87)[1] and their testimony was in substantial agreement with that of Petitioner and his accountant on all matters to which the order of the district court referred in its findings of affirmative fraud, trickery and deceit.

The case on appeal was based upon "the facts as found by the District Court." The government, therefore, accepted and in effect stipulated to the correctness of the trial court's findings that "neither Defendant nor his accountant had any conception of the significance of the term 'Special Agent.' . . . that the agents must have known that the Defendant and his accountant did not understand that the audit or investigation was criminal" (Appendix, p. A-3), that the defendant and his accountant asked "both Mr. Belschner and Special Agent Loventhal on several occasions when they met what they were doing, why the audit was taking so long, and whether fraud was involved" but that "not once did the Agents reply in the affirmative that 'fraud' or 'crime' was involved" (Appendix, p. A-3).

---

[1]Two hearings were held, one on September 9, 1968, and the other on July 25, 1969. The transcript of the testimony taken at the first is identified as "Tr. A.," that of the second, as "Tr. B."

The trial court also found and the government also necessarily conceded that any statements which the Agents might have made relative to an attempt to defeat or evade tax "were coupled with considerable conversation concerning legitimate deductions missed by the Defendant but picked up by them, and errors made by the Defendant in favor of the government [and that] such evasiveness by the Agents in the face of direct questions by the Defendant constitutes affirmative fraud, trickery and deceit" (Appendix pp. A-4-5).

Even though the government as appellant had not disputed but instead had predicated its appeal on "the facts as found by the District Court," the Court of Appeals for the Fifth Circuit reversed the judgment upon the basis of conclusions that the evidence did not support the findings of the trial court and that the defendant had failed to meet "his burden" of proving "*material* misrepresentation which *clearly* and *convincingly* shows fraud" (Appendix, p. A-13) (emphasis by the court).

The Court of Appeals for the Fifth Circuit held that the case at bar was controlled by its earlier decision in *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970, *petition for certiorari filed*), a copy of which opinion is attached (Appendix, pp. A-16-44). The cases are alike in that both involve the applicability of *Miranda*-type warnings to income tax fraud investigations, and in neither was such a warning given, but there are marked differences in other respects both factually and procedurally. Of major significance is the fact that in *Prudden* the government placed in issue the sufficiency of the evidence to support the district court's findings of fact while in the case at bar the government accepted as true "the facts as

found by the trial court" and simply contended that evidence did not become inadmissible even though procured by fraud, trickery or deceit.

REASONS FOR GRANTING THE WRIT

The qualifications for review on certiorari, as specified in Rule 19 of this Court, are abundantly and compellingly fulfilled by the case at bar.

1. *The holding that* Miranda *is inapplicable to criminal investigations of income tax evasion is not only in conflict with decisions of another court of appeals, but is also, in effect, an invitation to this Court to decide an important question of federal law which has not been but should be decided by this Court.*

Petitioner has consistently maintained that when the nature of the investigation changed from civil to criminal he should have been given—but admittedly was not—the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The only reference to the point in the opinion of the Court of Appeals is the note reading (Appendix, p. A-12):

> "Because he found the agents had obtained the evidence from the defendant-taxpayer by fraud, trickery and deceit, the District Judge did not reach the question whether the agents were required to give *Miranda* warnings when the nature of the investigation changed from civil to criminal. If there was any doubt about this question before, it was resolved by *United States v. Prudden*, 5 Cir. 1970, —— F.2d —— [No. 28,140, April 10, 1970] which held that *Miranda* warnings are not required."

The court, thus, incorporated and made applicable here its previous rulings in *Prudden* where the con-

flict with other decisions was clearly recognized. Referring to *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), the court wrote (424 F.2d 1028; Appendix, p. A-28):

> "*Dickerson* held that *Miranda* warnings must be given a taxpayer at the inception of first contact with him following the transfer of a tax case to the Intelligence Division. . . .
>
> ". . . Such a rule is over broad and we *expressly decline to follow it.*" (Emphasis added.)

When one court of appeals expressly declines to follow the holding of another equal court, the issue unquestionably is squarely presented to this Court for decision. The need for action by this Court is emphasized here because of the importance of the matter to all of the people of the nation. The particular circuit in which a taxpayer resides should not be determinative of his constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States.

As the intermediate court was forced to concede in *Prudden*, this Court's decision in *Mathis v. United States*, 391 U.S. 1 (1968), conclusively rejected the lower holding that tax investigations are totally immune from the *Miranda* requirements for warnings. The circuit court, however, assumed to read *Mathis* as turning entirely upon the fact of physical custody even though the taxpayer had been encarcerated for an entirely separate offense. In *Prudden*, therefore, the circuit court modified its previous conclusion—*Mathis v. United States*, 376 F.2d 597 (5th Cir. 1967, *rev'd.*) —only to the extent of recognizing that *Miranda*-type warnings are required whenever there is physical restraint.

The Court of Appeals for the Seventh Circuit has obviously differed in its construction both of *Miranda* and of *Mathis*. With regard to the earlier decision, that court in *Dickerson* wrote (413 F.2d 1114):

> "Intelligent exercise or waiver of the Fifth Amendment privilege is the heart of the Court's concern in *Miranda*. . . . We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. . . . But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence. See Hewitt, 'The Constitutional Rights of the Taxpayer in a Fraud Investigation,' 44 Taxes 660, 668, (1966)."

Only this Court can say whether *Miranda* (a) is applicable exclusively to persons physically restrained or (b) requires that one confronted with governmental authority in an adversary situation must be accorded the opportunity of making an intelligent choice. Clearly the Fifth and Seventh Circuit Courts have read *Miranda* differently. The same is true of *Mathis*, which the Court of Appeals for the Seventh Circuit did not construe as requiring physical restraint but rather as supporting its interpretation of *Miranda*.

The Court of Appeals for the Seventh Circuit rejected the government's contention that custodial detention was the determinative factor as to *Miranda* applicability (413 F.2d 1115-1116):

> "The Government argues that the absence of custodial detention and other indicia of criminal pros-

ecution in the tax fraud investigation negatives any possibility of coercion or overbearing of the taxpayer's will. But it is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe."

The Court of Appeals for the Fifth Circuit has clearly adopted the identical contentions which the Seventh Circuit rejected. The holdings of the two courts of appeals are in diametric conflict, both in their interpretation of *Miranda* and in their interpretation of *Mathis*.

The need for clarification by this Court is further emphasized by the recent civil case of *Romanelli v. Commissioner*, 54 T.C. ___, No. 138, Docket No. 3504-67, filed July 2, 1970. The majority of the Tax Court held that admissions obtained without *Miranda* warnings are admissible in a civil suit but specifically pointed out that:

"... petitioner's privilege against self-incrimination may be adequately safe-guarded by an appropriate exclusionary order in any criminal proceeding which may follow."

In a footnote there it was also explained that:

"The exclusionary rule with respect to compelled testimony encompasses the 'fruit' of the testimony as well as the compelled testimony itself. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964); *Arndstein v. McCarthy*, 254 U.S. 71 (1920). The Government bears the burden of proving in any subsequent criminal proceeding the absence of

'taint' respecting evidence it seeks to offer by establishing an independent source of such evidence. *Murphy v. Waterfront Comm'n, supra*, at 79 fn. 18."

The position taken in the dissenting opinion was that not only should *Miranda* warnings be requisite to admissibility of evidence in criminal prosecutions but that they should be required in civil proceedings as well. A concurring opinion agrees with the majority ruling in the specific case but expresses the view that it is not sufficient to confine the prohibition to the use of the fruits of custodial situations to instances where the interrogee's physical safety is threatened.

The fact that the Internal Revenue Service has adopted a policy in conformity with the Seventh Circuit decision and the holding of the Tax Court does not lessen the importance of the issue here. The rules of the Internal Revenue Service are subject to change, and failure to follow rules has been held to be insufficient to require exclusion of evidence. *United States v. Luna*, — F.Supp. — (W.D.Tex. 1970), and *United States v. Middleton*, — F.Supp. — (D.C.Minn. 1970). The issue here is basically judicial rather than administrative. Even before *Miranda*, this Court in *Mapp v. Ohio*, 376 U.S. 643 (1961), pointed out that judicial integrity is at stake when a determination must be made as to the use of evidence previously found to have been illegally obtained.

2. *In holding that the burden is on the defendant to prove that evidence was obtained from him by material misrepresentation which clearly and convincingly shows fraud, the decision below is in conflict with decisions of this Court and of other courts of appeals holding that the prosecution has the burden of proving that consent was voluntarily given.*

The documents and oral evidence which were the subject of Petitioner's motion to suppress were not taken pursuant to warrant. In reply to Petitioner's motion based on the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States, the government took the position that the "admissions made in the case at bar were truly voluntary and hence not obtained in violation of . . . constitutional rights" (Brief for Appellant, p. 22). The district court granted the motion to suppress; the Court of Appeals for the Fifth Circuit reversed, holding (Appendix, p. A-13):

> "We cannot say on this record that there was a *material* misrepresentation which *clearly* and *convincingly* shows fraud and the defendant has therefore failed to meet his burden." (Italics by the Court.)

The court, thus, squarely placed the burden of proof on the defendant. Other courts in the same situation place the burden of proof on the government. In *Bumper v. State of North Carolina*, 391 U.S. 543 (1968), this Court ruled that (391 U.S. 548-550):

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."

There is like conflict with *Arrington v. Maxwell*, 409 F.2d 849 (6th Cir. 1969), where the holding reads (409 F.2d 851):

> "The District Court was correct in ruling that the Common Pleas judge erred in placing the burden on Arrington to prove the involuntariness of his admissions. Such had been the law of Ohio, but it was in conflict with Jackson v. Denno, 378 U.S.

368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964), and Sims v. Georgia, 385 U.S. 538, 544, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967), which held that before the issue of voluntariness of a confession can be submitted to a jury the trial judge must make his own independent determination that the confession was voluntary. We consider that under these decisions the burden of proving voluntariness of a confession is upon the prosecution."

Another decision in point is *Wren v. United States*, 352 F.2d 617 (10th Cir. 1965), *cert den.*, 384 U.S. 944 (1966), where the holding was (352 F.2d 618):

"It is fundamental in our judicial process, as guaranteed by the Fourth Amendment, that we are secure in our persons, houses, papers and effects against unreasonable searches and seizures. This constitutional right, like all others, may be waived by voluntary consent. In order to constitute a voluntary consent it must clearly appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved. In addition, such person must be cognizant of his rights in the premises, the consent must not be contaminated by any duress or coercion and the government has the burden of proof."

In *Judd v. United States*, 190 F.2d 649 (D.C.Cir. 1951), the court summarized (190 F.2d 650-651):

"Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed.

654; United States v. Kelih, D.C.S.D. Ill. 1921, 272 F. 484. The Government must show a consent that is 'unequivocal and specific' (Karwicki v. United States, 4 Cir., 55 F.2d 225, 226); 'freely and intelligently given.' Kovach v. United States, 6 Cir., 53 F.2d 639."

Particularly applicable to the record here is the final holding in the above case where the court explained that, (190 F.2d 652):

> "Before a court holds that a defendant has waived his protection under the Fourth Amendment, 'there must be convincing evidence to that effect.' Nueslein v. District of Columbia, 73 App.D.C. 85, 89, 115 F.2d 690, 694. Here, the officers themselves do not appear completely convinced.
>
> ". . . The real issue is whether the evidence offered by the Government, taken at full value, meets the required standard. We hold that it does not: that there has not been a sufficient showing of true consent, free of duress and coercion. Standards of this sort must be maintained and enforced by the trial and appellate courts. If they are not, the guarantees of the Bill of Rights can quickly disappear through tacit nullification. We must hold that there was no consent and that the search and seizure were not permissible. Accordingly, the evidence was inadmissible and the motion to suppress should have been granted."

Similarly, in *United States v. Page*, 302 F.2d 81 (9th Cir. 1962), it was pointed out that (302 F.2d 83-84):

> "Because of the importance of preserving constitutional rights, various rules have been stated for the guidance of the trial judge in determining whether consent to the search was in fact given. The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'un-

equivocal and specific and 'freely and intelligently given.' There must be convincing evidence that defendant has waived his rights. There must be 'clear and positive testimony.' 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights.' Coercion is implicit in situations where consent is obtained under color of the badge, and the government must 'show that there was no coercion in fact.'"

Still another court of appeals in *Simmons v. Bomar*, 349 F.2d 365 (6th Cir. 1965), wrote (349 F.2d 366):

> "Consent to a search, in order to be voluntary, must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred. United States v. Como, 340 F.2d 891 (C.A.2). The government has the burden of proving that such consent has been given."

The decision here subject to review is apparently unique both in assuming a waiver of constitutional rights without a shred of evidence to support such an assumption and in placing upon a defendant charged with crime the burden of negating consent to violation of constitutional rights.

3. The decision below calls for an exercise of this Court's power of supervision because it constitutes a complete departure from the accepted and usual course of judicial proceeding in holding that even though no warning whatsoever was given to Petitioner, the evidence was not illegally obtained but was instead voluntarily given.

Although the decision below utilizes none of the language normally found in search and seizure cases, Petitioner was apparently charged with the responsibility of assuming that the investigation was crimi-

nal merely because he was not specifically and categorically informed otherwise. The only portion of the opinion touching upon that matter even by implication is that which reads (Appendix, p. A-13):

> "The agents did not say or indicate in any way that their investigation was not criminal or that there was no possibility of a criminal prosecution. They said their function was to reconcile large discrepancies to see if they were the result of innocent errors. If anything, such a statement to an attorney and his accountant, especially when accompanied by prolonged investigation, should have put the taxpayer on guard that if the agents determined that the large discrepancies were not the result of innocent errors he would be subject to criminal prosecution."

The complete absence of any warning to Petitioner in the case at bar distinguishes it from the decisions of other circuits holding that evidence had been voluntarily given rather than illegally obtained. In *Schlinsky v. United States*, 379 F.2d 735 (1st Cir. 1967), *cert. den.*, 389 U.S. 929 (1967), the court held that a motion to suppress had been properly denied on the ground that the defendant's actions were voluntary because when (379 F.2d 738):

> ". . . the possibility of criminal liability appeared, the case was turned over to a Special Agent who, at his first meeting with the defendant, advised him that he need not answer any questions, that he need not produce any records that might incriminate him, and that he could terminate the interview at any time."

In *Frohmann v. United States*, 380 F.2d 832 (8th Cir. 1967), the evidence in question was found to be admissible because the Special Agent had "advised the defendant that he had a right not to answer any

questions" and the defendant had "replied that he 'did not intend to use that privilege' " (380 F.2d 835).

In *United States v. Mansfield*, 381 F.2d 961 (7th Cir. 1967), *cert. den.*, 389 U.S. 1015 (1967), the evidence in question was held to have been voluntarily given because the defendant had been told by the agent that "there was a possibility of criminal prosecution and that Dr. Mansfield did not have to talk to the agents or show them any records" (381 F.2d 963). In *Spinney v. United States*, 385 F.2d 908 (1st Cir. 1967), *cert. den.*, 390 U.S. 921 (1968), the court quoted a transcript of the interview with the defendant wherein he was specifically told that "you should understand if you do make any statements, or submit any evidence, these statements must be made under oath, and you should be cognizant of your constitutional guarantee against self-incrimination" (385 F.2d 909).

In *United States v. Mackiewicz*, 401 F.2d 219 (2nd Cir. 1968), *cert. den.*, 393 U.S. 923 (1968), there was both a warning and a specific finding of waiver. In reciting the facts the court there pointed out that (401 F.2d 220-221):

> "Agent Harden displayed his badge and advised Mr. Mackiewicz that he was making an inquiry into certain tax deficiencies on his and Mrs. Mackiewicz's joint return. He further told Mr. Mackiewicz that he did not have to answer any questions or produce any documents which might incriminate him. The agent repeated this, and Mr. Mackiewicz indicated, by an affirmative nod, that he understood."

Upon the basis of that and other evidence before it, the court held (401 F.2d 223):

> "Finally, we conclude that Mr. Mackiewicz knowingly and intelligently waived whatever rights he

had. He indicated that he understood the warning the agents gave him. . . . Under these circumstances, we believe that he unequivocally and freely consented to the searches and seizures and he intelligently and knowingly agreed to answer the agents' questions."

In *Muse v. United States*, 405 F.2d 40 (8th Cir. 1968), *cert. den.*, 393 U.S. 1117 (1969), it was shown that the Special Agent, upon introducing himself, read a full constitutional warning. In *Cohen v. United States*, 405 F.2d 34 (8th Cir. 1968), *cert. den.*, 394 U.S. 943 (1969), the defendant was advised that he need not answer any questions which tended to incriminate him. He responded that he understood. The court, therefore, held that the evidence had been voluntarily given. The decision is particularly significant in that in footnote 7 (405 F.2d 37-38), a review of the decisions of the courts of appeals of the various circuits in income tax fraud cases shows that the courts of all circuits, other than the Fifth Circuit, have held evidence to have been voluntarily provided by the defendant only in instances where the defendant was warned of his right to remain silent. Although under the circumstance of a warning's having been given and the defendant's having indicated his understanding thereof, the court held that the full *Miranda* warnings were not essential, the court concluded its opinion with the statement that (405 F.2d 40):

"We also reemphasize the views that we expressed in *White* that disclosures to Internal Revenue Service Agents, Revenue or Special, must be entirely voluntary and must not be induced by coercion, fraud, or misrepresentation."

Where, as in the case here subject to review, not even a minimal warning was given and the government

even admitted to some deceit on the part of the agents, it appears that only the Court of Appeals for the Fifth Circuit would hold evidence obtained under such circumstances to be admissible. The situation calls for an exercise of this Court's power of supervision.

4. In condoning the conduct of the Revenue Agents in securing evidence from Petitioner, the decision below conflicts with applicable decisions of this Court and other courts of appeals.

The decision below recognizes as a general rule that "Revenue Agents cannot obtain information from taxpayers by fraud, trickery or deceit which misrepresents the nature of the search" (Appendix, p. A-13), but the record conclusively establishes that in the same decision judicial sanction was given to conduct which the government itself conceded to constitute "affirmative fraud, trickery and deceit."

Throughout the case, the government assumed and contended that it is perfectly all right for Treasury Agents to deceive the taxpayer, that they have no obligation to respond to direct questions, that they may make misleading replies, and that they may deliberately encourage the taxpayer to misunderstand the real nature of their investigation. The government's position is made abundantly clear by the statement that (Brief of Appellant, p. 7) "deceit practiced by law enforcement officials, in and of itself, is not enough to warrant suppression of confessions or admissions."

The government did not attempt to question the facts; they were clearly and undisputedly shown by the record. Instead, the government's position was that "deceit" of Internal Revenue Service representatives did not warrant suppression of evidence unless it was so extensive as "to overbear defendant's will" (Brief

of Appellant, p. 8). The court below obviously, if not specifically, adopted that contention in holding that the record here failed to establish "a *material* misrepresentation which *clearly* and *convincingly* shows fraud" (Appendix, p. A-13).

This Court has refused so to limit the requirement of the Fourth Amendment. In *Gouled v. United States*, 255 U.S. 298 (1921), it was explained that (255 U.S. 305-306):

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.
>
> "Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his ab-

sence, falls within the scope of the prohibition of the Fourth Amendment, ..."

In *Hoffa v. United States*, 385 U.S. 293 (1966), this Court repeated the rule that (385 U.S. 301):

> "The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area. Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647. And the protections of the Fourth Amendment are surely not limited to tangibles, but can extend as well to oral statements. Silverman v. United States, 265 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734."

The agents here were repeatedly asked whether their investigation was criminal in nature. They admitted that they never replied in the affirmative but instead evaded making a direct answer. With those undisputed facts before it, the court below held that the record did not establish the existence of fraud. Another court of appeals, however, has held in *Charles Hughes & Co., Inc., v. Securities & Exchange Commission*, 139 F.2d 434 (2nd Cir. 1943), *cert. den.*, 321 U.S. 786 (1944), that (139 F.2d 437):

> "The law of fraud knows no difference between express representation on the one hand and implied misrepresentations or concealment on the other. Strong v. Repide, 213 U.S. 419, 430, 29 S.Ct. 521, 53 L.Ed. 853; United States v. Brown, 2 Cir., 79 F.2d 321, certiorari denied 296 U.S. 650, 56 S.Ct. 309, 80 L.Ed. 462."

The decision below would give to Internal Revenue Agents a degree of latitude in securing evidence for criminal prosecutions which has never before been approved, not even in *Prudden* and clearly not by any of the other courts of appeals as is shown in the previous discussions of conflict in holdings on other aspects of the case.

5. *The decision below departs from the accepted and usual course of judicial proceedings in that (a) the holding was based on a point not placed in issue by the government as appellant and (b) the factual determination of the district court was reversed without regard to the "clearly erroneous test."*

The decision below rests entirely upon the court's determination that Petitioner "failed to meet his burden" of proving a "*material* misrepresentation which *clearly* and *convincingly* shows fraud" (Appendix, p. A-13; italics by the court). The government, as appellant had not contended that Petitioner had any such burden; it had not sought appellate review of any fact finding of the District Court.

It is, therefore, abundantly clear that the decision below rested upon issues which were neither raised nor briefed by the government. Rule 28(a)(2), Federal Rules of Appellate Procedure, specifies that the appellant's brief should include "a statement of the issues to be reviewed." The government's brief submitted to the court below contains a statement of two issues (quoted hereinabove, p. 4), but neither in any way purports to seek review either of "burden of proof" or of the district court's fact findings of "affirmative fraud, trickery and deceit." Thus, from the procedural standpoint, the decision below is contrary to rule authority and in conflict with *Preferred Risk Mutual Insurance Company v. Thomas*, 372 F.2d 227 (4th Cir. 1967), and *North Texas Producers' Association v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. den.*, 382 U.S. 977 (1966).

Even in cases where fact findings of a district court are placed in issue by an appellant, it is contrary to

the accepted and usual course of judicial proceedings for a court of appeals to reverse the trial court, as was done in the decision below, merely because the appellate court reached a different conclusion on the evidence. The district court here found "affirmative fraud." Fraud is a question of fact. *Brooks v. American Brass Company*, 263 F.2d 166 (6th Cir. 1959); *Teitelbaum v. C. I. R.*, 294 F.2d 541 (7th Cir. 1961), *cert. den.*, 368 U.S. 987 (1962). The accepted and usual course of judicial proceedings for review in such instances is typified by *United States v. Ziemer*, 291 F.2d 100 (7th Cir. 1961); *cert. den.*, 368 U.S. 877 (1961), where the court explained that (291 F.2d 102):

> "As a reviewing court we have no right to weigh the evidence and determine which witnesses told the truth. The trial judge's decision on the matter of fact, which was supported by evidence which he deemed credible, should not be set aside by this court even though from a reading of the entire record we might, (although we do not) come to an opposite conclusion."

In conformity with the above practice, *see also United States v. Tyller*, 397 F.2d 494 (7th Cir. 1968), *cert. den.*, 393 U.S. 937 (1968); *Byrd v. Lane*, 398 F.2d 750 (7th Cir. 1968), *cert. den.*, 393 U.S. 1020 (1968); and *Howard v. Swenson*, 404 F.2d 469 (8th Cir. 1968).

The decision below does not even purport to have rested upon the "clearly erroneous" test. The record here could not be said to meet the requirements of that test as set out in *Jackson v. United States*, 353 F.2d 862 (D.C.Cir. 1965). It is respectfully submitted that such a departure by a court of appeals calls for the exercise of this Court's power of supervision.

6. *The decision below represents an assumption of jurisdiction exercised without compliance with*

requirements of the statute asserted as authorizing appeal and, therefore, calls for an exercise of this Court's power of supervision.

The paragraph of 18 U.S.C. §3731 under which the government took its appeal from the district court order makes requisite to appeal from an order suppressing evidence the certification of the United States attorney that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant. The notice of appeal herein filed contains a certificate but it is signed by a person who indentified himself as Assistant Attorney General and whose address is shown in all instruments filed in this cause to be Justice Department, Washington, D. C., not by the United States attorney for the United States District Court for the Eastern District of Texas. Petitioner's motion to dismiss grounded upon the absence of the authorized signature on the notice of appeal was denied by the Court of Appeals for the Fifth Circuit (Appendix, p. A-8).

The particular provision here involved was added to 18 U.S.C. §3731 in 1968 (Pub.L. 90-351, Title VIII, §301, 82 Stat. 237). Prior to that enactment a district court order dismissing an indictment was appealable by the government but the granting of a motion to suppress evidence was not. The government, however, appealed from a suspension order where the indictment had not been dismissed, contending that under the circumstances of the case the suspension order was tantamount to requiring a dismissal and in *United States v. Carroll*, 234 F.2d 679 (D.C. Cir. 1956), secured a reversal of the district court order.

Just as the Court of Appeals for the District of

Columbia in *Carroll* assumed that a motion to suppress evidence was appealable if the suppression order would ultimately require dismissal of the indictment, the Fifth Circuit in the case at bar must have assumed that certification of notice of appeal by an Assistant Attorney General was substantially the same as certification by "the United States attorney" for the district court.

In *Carroll*, however, this Court granted certiorari and reversed the court of appeals. The entire thrust of the opinion is that on government appeals in criminal cases exact compliance with statutory requirements is mandatory. *Carroll v. United States*, 354 U.S. 394 (1957). The basic rule there stated by this Court is that (354 U.S. 399-400):

> "It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. . . .
>
> ". . . in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by the statute."

In response to the government's contention there that form should not be exalted over substance, this Court pointed out that (354 U.S. 406):

> ". . . in a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction. While it is always necessary to categorize a situation realistically, to place a given order according to its real effect, it remains true

that the categories themselves were defined by the Congress in terms of form. Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable. In particular is this true of the Government in a criminal case, for there is no authority today for interlocutory appeals. . . ." (Italics by the Court.)

When the provision under which this appeal was taken was ultimately enacted in 1968, Congress required that the notice of appeal be certified by "the United States attorney." It cannot be assumed that the term was lightly or loosely used. Under such circumstances, there would appear to be no more justification for equating an "Assistant Attorney General" to "the United States attorney" than for equating an order granting a motion to suppress asserted to require dismissal to a dismissal in fact. Congress must be presumed to have chosen language carefully and to have meant what it said.

The representative of the federal government at the local level is the United States attorney. His office is separate and apart from that of the Attorney General. He is appointed directly by the President and may be removed only by the President. 28 U.S.C. §541. The direction he exercises in the conduct of his office is independent.

The power and authority of the Attorney General to supervise litigation to which the United States, an agency or an officer thereof, is a party, is limited by the opening phrase of 28 U.S.C. §519—"except as otherwise authorized by law." Since proposals to permit government appeal from orders granting motions to suppress were repeatedly urged unsuccessfully before

the measure was ultimately enacted in 1968. Congress' final specification of "the United States attorney" as the person to make certification for notice of appeal appears most logically to be a requirement that in this unusual extension of criminal appellate jurisdiction the participation and agreement of the local officer would be required.

CONCLUSION

The decision below departs radically from both substantive and procedural judicial precedent. The matters involved are of extreme general and national significance. Questions are presented which have not been, but should properly be, conclusively determined by this Court. The holdings below cannot be reconciled with those of other courts of appeals.

The admissibility of evidence in a criminal trial in a federal district court should not be determined by the area or district in which the defendant resides. The conduct of revenue agents in obtaining records and evidence from taxpayers should not be controlled by the circuit in which cases are to be tried. The authority of a federal district court to pass upon the evidence should not be different in the courts of one circuit from that in the courts of other circuits.

The maintenance of uniformity in the administration of criminal justice in the federal courts is jeopardized by the decision below. All of the reasons listed above are, therefore, most strenuously urged as basis for this Court's exercise of discretion in granting of the writ.

Respectfully submitted,

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